

A.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS, VA
PUGET SOUND HEALTH CARE SYSTEM,
Tacoma, WA, Employer**

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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 6, 2020 appellant filed a timely appeal from November 6 and December 9, 2019 merit decisions and a December 19, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that an incident occurred in the performance of duty on September 10, 2019, as alleged; (2) whether appellant has established entitlement to continuation of pay (COP); and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of the December 9, 2019 decision, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 30, 2019 appellant, then a 61-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 10, 2019 he sustained a hairline fracture to his lumbar spine after slipping and falling in mud while in the performance of duty. He noted that he was walking to a trash can in a parking lot when he slipped and fell. On the reverse side of the claim form the employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on September 10, 2019 and returned to work on October 28, 2019.

By decision dated November 6, 2019, OWCP denied appellant COP as he had not reported his September 10, 2019 injury on an OWCP-approved form within 30 days of the date of injury.

In a November 6, 2019 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information including whether the alleged injury occurred on employing establishment premises and whether the parking facilities were owned, controlled, or managed by the employing establishment. It afforded both parties 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated December 9, 2019, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish that the September 10, 2019, employment incident occurred as alleged. It noted that appellant had not responded to the November 6, 2019 development questionnaire. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 17, 2019 appellant requested reconsideration of the December 9, 2019 decision. He asserted that OWCP had failed to evaluate documents that he had previously submitted.

By decision dated December 19, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁴ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁷ The second component is whether the employment incident caused a personal injury.⁸

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ The employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a case has been established. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹⁰

³ *Supra* note 1.

⁴ S.S., Docket No. 19-1815 (issued June 26, 2020); S.B., Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ S.A., Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.K.*, Docket No. 19-0904 (issued April 10, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *See P.S.*, Docket No. 19-1818 (issued April 14, 2020); *J.M.*, Docket No. 19-1024 (issued October 18, 2019); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

¹⁰ *See P.S., id.*; *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that an incident occurred in the performance of duty on September 10, 2019, as alleged.

In his Form CA-1, appellant noted that on September 10, 2019 he sustained a hairline fracture to his lumbar spine after slipping and falling in mud. However, he did not submit a detailed account of the alleged injury or any additional corroborating factual evidence describing how he sustained an injury on September 10, 2019. The Board has found that such a vague recitation of facts does not support a claimant's allegation that a specific event occurred to cause a work-related injury.¹¹

In a letter dated November 6, 2019, OWCP informed appellant that the factual evidence of record was insufficient to establish that the September 10, 2019 employment incident occurred as alleged. It requested that appellant complete an attached questionnaire and provide a detailed factual description of the alleged employment incident. Appellant, however, did not respond to OWCP's development letter. He neither presented evidence regarding the specific mechanism of injury, as required in a claim for traumatic injury, nor did he allege that he experienced a specific event, incident, or exposure at a definite time and place, and in a definite manner.¹² As appellant has not provided a detailed factual statement describing the alleged September 10, 2019 employment incident, the Board finds that he has not met his burden of proof to establish that he experienced the employment incident at the time, place, and in the manner alleged, or that it caused an injury.¹³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8118 of FECA provides for payment of COP, not to exceed 45 days, to an employee who has filed a claim with his or her immediate supervisor for a period of wage loss due to a traumatic injury on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of FECA.¹⁴ This latter section provides that written notice of injury shall be given

¹¹ *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *M.B.*, Docket No. 11-1785 (issued February 15, 2012).

¹² *Id.*; see also *Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002).

¹³ *M.C.*, *supra* note 11; *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

¹⁴ 5 U.S.C. § 8118; 20 C.F.R. §§ 10.5(q), (ee); *S.D.*, Docket No. 19-1819 (issued July 2, 2020); *A.F.*, Docket No. 14-1838 (issued January 22, 2015); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

within 30 days.¹⁵ The context of section 8122 makes clear that this means within 30 days of the injury.¹⁶

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish entitlement to COP.

20 C.F.R. § 10.205(a)(1) provides that to be eligible for COP, a person must have a traumatic injury which is employment related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment. Here, OWCP denied the traumatic injury claim by decision dated December 9, 2019 finding that appellant had not established an injury occurring at the time and place, and in the manner alleged. Since there is no traumatic injury, there is no employment-related disability. Consequently, the Board finds that appellant is not eligible for COP.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 8128 (a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation, at any time, on his or her own motion or on application.¹⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁰

¹⁵ *Id.* at § 8122(a)(2).

¹⁶ *C.C.*, Docket No. 18-0912 (issued July 11, 2019); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

¹⁷ 20 C.F.R. § 10.205(a)(1-3).

¹⁸ *See J.V.*, Docket No. 15-1942 (issued March 8, 2016); *J.O.*, Docket No. 12-0267 (issued June 11, 2012).

¹⁹ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *W.C.*, 59 ECAB 372 (2008).

²⁰ 20 C.F.R. § 10.606(b)(3); *see C.C.*, Docket No. 19-1622 (issued May 28, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²² If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of the December 9, 2019 decision, pursuant to 5 U.S.C. § 8128(a).

In his timely request for reconsideration, appellant alleged that OWCP had failed to evaluate several documents that he previously submitted. However, he did not identify the alleged documents or submit copies of the documents with his reconsideration request. Appellant also did not submit new evidence in support of his request for reconsideration. As such, the Board finds that he did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered by OWCP.²⁴ Consequently, appellant is not entitled to a review of the merits of his claim based on any of the above-noted requirements under 20 C.F.R. § 10.606(b)(3).

On appeal appellant relies on additional evidence submitted on appeal in support of his claim. However, as noted, evidence not before OWCP will not be considered by the Board for the first time on appeal.²⁵ Accordingly, the Board is precluded from reviewing this additional evidence for the first time on appeal.

The Board therefore finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁶

²¹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b (February 2016).

²² *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *see C.C.*, *supra* note 20; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁴ *Supra* note 20.

²⁵ *Supra* note 2.

²⁶ *D.M.*, Docket No. 18-1003 (July 16, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that an incident occurred in the performance of duty on September 10, 2019, as alleged. The Board further finds that appellant has not met his burden of proof to establish entitlement to COP. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of the December 9, 2019 decision, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 19 and 9, and November 6, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 11, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board